

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 441 OF 2004.

1. Shri Yakub Khan
2. Shri Aktar Khan
3. Shri Rahim Khan
4. Shri Afjal Khan and
5. Rubina Bi

All r/o House No. 225,
Borda, Margao – Goa,
represented by Petitioner
No. 2 Shri Aktar Khan

..... Petitioners

versus

1. Antonio Clemente Pacheco
and his wife
2. Martha Pacheco
both residents of Borda,
Margao – Goa and
3. The Mamalatdar of Salcete
Taluka having its office at
Collectorate Building,
Margao – Goa.

..... Respondents

Mr. S. G. Dessai, Senior Advocate with Mr. S. D. Padiyar, Advocate for the Petitioners.

Mr. C. A. Mascarenhas, Advocate for Respondent Nos.1 and 2.

Mr. P. A. Kamat, Government Advocate for Respondent No. 3.

CORAM : B. H. MARLAPALLE, J.

DATE : 7TH OCTOBER, 2004.

ORAL ORDER :

1. This Petition has assailed the order of Eviction passed by the Deputy Collector and District Level Rent Controller, Margao in Case No. 35/1988 and confirmed by The Administrative Tribunal, Goa in Eviction Appeal No. 32/2004 and therefore it has to be treated as a Petition under Article 227 of the Constitution, though it has been titled under Petition under Article 226 and 227 of the Constitution.

2. As per the Petitioners, Late Shri Adam Khan came to occupy the suit house sometimes in February 1961 and in the year 1978 he had filed an application under section 29 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975 for registration of his name as “ Mundkar ” in respect of his dwelling house bearing no. 255, Borda, Margao – Goa. The application was contested by Respondents 1 and 2 on the ground that Shri Adam Khan was their Tenant and not a Mundkar and he was occupying the issued premises by virtue of a lease on monthly rent of Rs. 10/-. An inquiry was held and by Judgment and Order dt. 31.08.1984, the present respondent no. 3 dismissed the application filed under section 29 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975. This order was challenged by filing an appeal under section 24 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975 and by his Judgment and Order dt. 27.07.1987, The Additional Collector of Goa at Panaji dismissed the said Appeal.

3. The Respondents 1 and 2 approached the Rent Controller and instituted eviction proceedings registered as BLDG/35/88 on the ground that the tenant Late Shri Adam Khan and his family members, who hereby occupying the said property, failed to pay rent from December 1967 onwards. The tenants filed reply in the said eviction proceedings and raised a plea that they were Mundkars. While the eviction proceedings were pending the Petitioners / Tenants approached the Administrative Tribunal in Mundkar Revision Application No. 4/88 and challenged the order of the Mamlatdar as well as the Additional Collector denying the status of Mundkar. This Revision Application was allowed partly by the Administrative Tribunal and the order dt. 27.07.1987 passed by the Additional Collector dismissing the Appeal No. 93/1984 was set aside and the appeal was restored. It was remanded to the Additional Collector, South – Goa for disposing the same on the issue namely “ Whether the Respondent (Landlord) proves that deceased Adam Khan and his wife were allowed to occupy the suit house on payment of rent. “ On remand of the appeal, the present petitioners who were appellants before the Additional Collector did not take any steps and therefore their appeal which was restored was dismissed vide his order dt. 2.2.99 for default as the appellants had failed to appear before him inspite of several opportunities given.

4. In the Eviction Proceedings, the landlord filed an application praying to allow to bring on record 2 rent receipts dt. 4.10.1967 and

2.11.1967. The present petitioners opposed the said application by findings from same and after considering the rival contentions, the Additional Rent controller allowed the said two documents of rent receipts to be brought on record vide his order dt. 4.06.1997. This order was not challenged before any higher forum and thus it received finality. By Judgment and Order dt. 9.04.02, the Rent controller allowed the application filed by the landlord and directed respondents to vacate the suit premises and further to hand over the vacant and peaceful possession of the same to the applicants within a period of 30 days. No steps were taken to challenge this eviction within this statutory time provided and Eviction Appeal No. 32/2004 came to be filed before the Administrative Tribunal. While the Appeal was pending sometimes in April'04, the petitioners submitted fresh application under section 8-(A) read with section 5 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975. Praying for inquiry and declaration of appellants as Mundkars in respect of the suit house, notices in the said application have been issued by the Mamlatdar and by the impugned Judgment and Order dt. 2.8.04, the Administrative Tribunal was pleased to dismiss Eviction Appeal No. 32/04.

5. Mr. Dessai, Learned Senior Counsel appearing with Mr. S. D. Padiyar, Learned Advocate for Petitioners placed reliance on the decision of the Court in LPA No.3 / 2002 : “ Smt. Deffina Gomes Pinto and Ors. V/s Smt. Safia Bee and Ors. ” and submitted that the

eviction proceedings instituted were not maintainable and in any case were required to be dismissed. He also placed reliance on the decisions of this Court in the case of Smt. Gulabi Sangtu Devidas and ors. v/s Smt. Prema Govinda Gaonkar and ors., 1995 (1) Goa L. T. 154 and Kum. Maria Eliza Marques v/s Shri Madhukar M. Moraskar and ors., 1998 (1) Goa L. T. 100. Mr. Dessai further contended that the order of the Mamlatdar rejecting the petitioner's application under section 29 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975 was merged with the order of the Additional Collector and in view of the Mundkar Revision Application No.4/88, having been partly allowed, the order of the Mamlatdar did not survive as it was merged with the order of the Additional Collector. The petitioners, therefore, filed a fresh application under section 8-(A) read with section 5 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975 for inquiry and declaration of appellants as Mundkars in respect of the suit house and once that inquiry is in progress, the petitioner cannot be evicted. He also submitted that the findings of the Rent Controller as well as the Tribunal that Late Shri Adam Khan was a tenant and he was paying monthly rent were not supported with any reliable evidence and therefore the issue regarding the Petitioners status as Mundkar was still open to be decided by the Mamlatdar. Allowing the landlord to place on record 2 rent receipts was not sufficient though they have been exhibited to hold that Late Shri Adam Khan was paying monthly rent and therefore he was a tenant. These receipts were not proved and

merely exhibiting them was not sufficient. Reliance in this regards has been placed on the decision of Sait Tarajee Khimchand and ors. v/s Yelamarti Satyam and ors., AIR 1971 Supreme Court 1865 and H. Venkatachala Iyengar v/s B. N. Thimmajamma and ors., AIR 1959 Supreme Court 443. On the doctrine of merger the Learned Counsel relied upon the decision in the case of Kunhayammed and ors., v/s State of Kerala and anr., (2000) 6 Supreme Court Cases 359. To conclude his arguments, the Learned Counsel urged that the concurrent findings recorded by both the Rent Controller and the Administrative Tribunal suffered from manifest errors apparent on the face of the record and this Court by entertaining the Writ Petition must correct the injustice caused to the petitioners. In this regard he has referred to the decision in the case of M/s. Variety Emporium v/s V. R. M. Mohd. Ibrahim Naina, AIR 1985 Supreme Court 207.

6. In the case of Smt. Delfina Gomes Pinto (supra), a Division Bench of this Court held that : (A) By denial of the title of the landlord would mean that the tenant disputes that the applicant is not the person who is entitled to receive rent from him or who has inducted him into the tenancy,

(B) A mere plea of setting up a status would not amount to a denial of title of landlord and,

© The relationship of landlord and tenant would be established if the tenant was paying rent and the tenant could not claim the status of Mundkar.

In the case of Smt. Gulabi (supra) another Division Bench of this Court held that : (A) The burden upon the party who seeks declaration under section 8-(A) of the Mundkars under Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975 is quite substantive and heavy but the right to seek declaration is not lost merely because an adverse order is passed under section 29 of the said Act and,

(B) An application for a declaration under section 8-A is maintainable inspite of the decision recorded by the Mamlatdar under section 29 and adverse to the party seeking a declaration under section 8-(A) of the Act.

7. Two issues arise for considerations in this Petition namely:

(a) Whether the landlords have proved that the present petitioners occupied the suit house as tenants and,

(b) Whether there was prima facie case in support of the contentions of the petitioners that they are Mundkars of the suit premises.

On both these counts, the petitioners failed before the Rent Controller as well as the Administrative Tribunal. By allowing Mundkar Revision Application No. 4/88, The Administrative Tribunal had shifted the burden on the landlords to prove that deceased Adam Khan and his wife were allowed to occupy suit house on payment of rent. The tenants did not appear before the Additional Collector on restorations of the appeal and therefore appeal proceedings came to be dismissed by default on 2.2.99. The Revision Application was

partly allowed and the appeal filed by the tenants was restored which clearly implied that challenge to the Mamlatdar's order dt. 31.8.1984 was placed before the Additional Collector and there was no question of the doctrine of merger coming into play. The order passed by the Mamlatdar on 31.8.1984 was not set aside or was not deemed to be set aside just because the revision application filed before the Administrative Tribunal was partly allowed and Appeal No. 93/84 was restored before the Additional Collector for fresh decision. The decisions relied upon by the Petitioners in the case of Smt. Gulabi (supra) and Kunhayammed (supra) could not be of any assistance to the petitioners case.

8. The rent receipts at Exh. A – 4 (col) dt. 4.10.67 and 2.11.67 collectively were taken on record after verifying with the originals. Though Shri Adam Khan died on 13.2.1986, as per the order passed by the Administrative Tribunal in Mundkar Revision Application No. 4/88, the burden was cast on the landlords to prove that the deceased tenants were occupying the suit house on payment of rent and consequently to discharge this burden the receipts were brought on record. They were duly exhibited. The Tribunal rightly referred to the case of M/s. Jeetmal Ram Gopal v/s The Union of India, (1972)4 Supreme Court Cases 162 and held that it was reliable to hold that Shri Adam Khan was paying monthly rent in respect of the suit premises for sometime.

9. Even otherwise, it is clear from the order dt. 31.8.84 passed by the Mamlatdar rejecting the Application for declaration as Mundkars, that evidence was placed before him to prove that Mr. Vito Barbosa was occupying the suit premises up to January 1961 as a tenant. On his recommendations, Shri Adam Khan was inducted in the suit premises from February 1967 on payment of monthly rent of Rs.10/-. Before the Mamlatdar, the landlady was examined and in addition Angelo Barbosa and Assis Clemento were the 2 witnesses who deposed. Angelo (Vito) Barbosa had stated before the Mamlatdar that he had stayed in the suit house as a tenant for about 15 years and he vacated the same in the year 1961. The monthly rent was Rs. 1.25/- and later on it was increased to Rs. 3/- and finally when he vacated it was Rs. 5/-. The applicant Shri Adam Khan had met him at the old market and asked him whether he could get the suit house on lease. Assis Clemento was a school mate of Vito Barbosa and stated before the Mamlatdar that Vito Barbosa was staying as a tenant. The fourth witness namely P. Viegas also deposed before the Mamlatdar that Shri Adam Khan was paying rent to the landlady and confirmed having witnessed the payment of rent of the suit house by Shri Adam Khan to the landlady. On the face of this evidence, the Mamlatdar held that Shri Adam Khan was occupying the suit premises as a tenant and therefore he could not be declared as a Mundkar. The application filed under section 29 of the Goa Daman and Diu Mundkars (Protection From Eviction) Act, 1975 was dismissed. Thus the landlords had placed on record sufficient

evidence to prove that Late Shri Adam Khan came to be inducted in suit premises as a tenant.

10. Pendency of the fresh application filed under section 8-(A) of the Mundkars Act, 1975 before the Mamlatdar is of no consequence at this stage. The Mamlatdar, The Rent Controller and the Administrative Tribunal have on assesment of oral and documentary evidence record concurrent findings that Late Shri Adam Khan was inducted as a tenant and he was paying monthly rent for some time. The pending application of the petitioner for declaration as Mundkar cannot be considered unless these findings are set aside and there was no case made out to disturb these concurrent findings. Even before the Rent Controller, the landlords examined 2 witnesses. This evidence has been considered by the Rent Controller in its proper perspective. The decisions of this court in Smt. Delffina Gomes Pinto and Smt. Gulabi's case are of no assistance to the petitioners. The concurrent findings of all the 3 authorities below regarding Late Shri Adam Khan's status as a tenant are required to be confirmed as they do not suffer from any error apparent on the face of the record and therefore challenge to the order of eviction must fail.

11. Hence the Petition is rejected summarily. However, the Petitioners' undertaking furnished before the Mamlatdar to vacate the premises will not be executed for a period of two weeks from today.

B. H. MARLAPALLE, J.

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